IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB, *Petitioner,*

v.

WALTER J. HICKEL, et al., *Respondents.*

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARK L. EVANS
ANTHONY A. LAPHAM
RICHARD M. SHARP
DONALD S. BURRIS

734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS

162 Old Town Road
East Setauket, New York 11733

Attorneys for Amicus Curiae
Environmental Defense Fund

SHEA & GARDNER
Of Counsel

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, *Petitioner,*

v.

WALTER J. HICKEL, et al., *Respondents.*

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE ENVIRONMENTAL DEFENSE FUND

The Environmental Defense Fund (EDF) is a non-profit public-benefit corporation organized under the laws of the State of New York and composed of scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among its objectives are "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best promote a quality environment" [By-laws, Art. 1:2(d)]. EDF's "social action" includes education,

research, and when necessary "to prevent * * * environmental degradation" legal action which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that would otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as one of the nation's most effective and responsible litigants in this important field.

---

[1] See, *e.g.*, *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dept. of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, D. Mont., No. 1694 (order filed Aug. 27, 1970) (paper mill discharges); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed Aug. 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hardin*, D.D.C., Civil No. 2319-70 (complaint filed Aug. 5, 1970) (Mirex); *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, D.D.C., Civil No. 1722-70 (complaint filed June 2, 1970) (Olin DDT water contamination); *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, D.D.C., Civil No. 2655-69 (complaint filed Sept. 15, 1969) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Montrose Chem. Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Wildnerness Society, Inc. v. Hickel*, D.D.C., Civil No. 928-70 (complaint filed April 23, 1970) (trans-Alaska pipeline); *In re: Environmental Defense Fund, Inc.*, F.A.A., No. 1035-7 (petition filed Aug. 25, 1970) (SST).

EDF accordingly has a vital interest in seeking review of the lower court's decision, which if left undisturbed would authorize the unlawful degradation of public lands in Sequoia National Forest and Sequoia National Park and would foreclose to EDF litigation in the courts of the Ninth Circuit. Petitioner and respondents have consented to the filing of this brief.[2]

STATEMENT OF THE CASE

The Sierra Club, a non-profit California corporation, brought this action to enjoin the issuance of federal permits for the development of a large private resort in the Sequoia National Game Refuge area of Sequoia National Forest and the construction of an access road through the Sequoia National Park. In its motion for preliminary injunction the Sierra Club asserted that the threatened action would permanently destroy natural values of public lands and would irreparably harm the public interest in conserving those values; it alleged that the Secretary of the Interior would exceed his authority by authorizing the construction of the new highway and the installation of a private transmission line across the Park, and that the Secretary of Agriculture would exceed his authority by granting the developer a revocable permit covering some 13,000 acres of National Forest land in addition to a term permit covering 80 acres.

The District Court granted the preliminary injunction. On appeal the Ninth Circuit vacated the injunction, holding (1) that the Sierra Club lacked standing and (2) that the Sierra Club had shown neither a "reasonable certainty" that it would prevail nor irreparable injury. Judge Hamley, concurring in the result, would have held that the Sierra Club had standing.

---

[2]The written contents have been filed with the Clerk.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great importance. In this brief we show that the lower court's holding with respect to standing is in direct conflict with recent decisions of the Second Circuit and the District of Columbia Circuit, and that if left undisturbed it would insulate from judicial review many important administrative determinations affecting the nation's public lands and natural resources. We do not here take up the "merits" except to adopt the views expressed by the Petitioner.[3]

A. The Decision Below Conflicts with Decisions of Other Circuits

The Ninth Circuit's decision as to standing squarely conflicts with holdings of the Second Circuit and of the District of Columbia Circuit. The conflict concerns the application of this Court's decisions in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970) to a national environmental organization suing to vindicate the interests of the general public in conserving natural resources.

1. Under *Data Processing and Barlow*, the threshold test for standing to sue in federal courts—and the only test to which the court below addressed itself in holding that the Sierra Club had no standing—is whether the plaintiff has

---

[3]We strongly urge that the merits deserve review by this Court. We recognize, of course, that if the Court determined not to review the merits it could still decide the issue of standing, since a reversal on that ground would enable Petitioner to assert its prayer for permanent injunctive relief. See *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 475-76 (9th Cir. 1969). This course would, however, open the way to commencement of work on the project and would leave the Sierra Club with serious practical obstacles to obtaining meaningful relief. Thus, our silence on the merits is not to be construed as an invitation to limit the grant of certiorari. Indeed, we anticipate that if the petition is granted we will file a brief covering all the issues to which the writ is directed.

"the personal stake and interest that impart the concrete adverseness required by Article III" [*Barlow*, 397 U.S. at 164.] In practical terms, this means the plaintiff must allege that "the challenged action has caused him injury in fact" [*Data Processing*, 397 U.S. at 152.] While the Court was clear that the interest sought to be protected by the plaintiff "may reflect 'aesthetic, conservational, and recreational' as well as economic values" [*id.* at 154], the plaintiffs in *Data Processing* and *Barlow* were able to allege direct economic harm; the Court therefore had no occasion to consider what allegations would be required to sustain the standing of an organization that suffered no special harm to itself but that sued to protect the public interest [see 397 U.S. at 172 n. 5 (opinion of Mr. Justice Brennan)].[4]

---

[4]The remaining two tests under *Data Processing* and *Barlow* are "whether the interest sought to be protected * * * is arguably within the zone of interests to be protected or regulated by the statute * * * in question" [*Data Processing*, 397 U.S. at 153] and "whether judicial review * * * has been precluded" [*id.* at 156]. The Court below did not reach these questions except to suggest with respect to the "zone of interests" inquiry that "the significance of the language is not clear" and that "it does not establish a test separate and apart from or in addition to" the injury in fact test [Appendix to Petition ("App."), p. 13].

Resolution of the threshold test favorably to the Petitioner here will mean that it has standing, for the remaining questions can reasonably be answered only in the Sierra Club's favor. Thus, there can be no serious doubt that the interest asserted by the Sierra Club—*ie.*, the interest in protecting Sequoia National Forest and Sequoia National Park—is within the zone of interests protected by the relevant statutes. See 16 U.S.C. § § 43, 45b, 551 (1964). Nor can there be any serious assertion that Congress has expressly or impliedly precluded judicial review of unauthorized agency action with respect to public lands in general or the lands here in issue. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

The issue thus left open by this Court was presented almost simultaneously to the Second Circuit, the District of Columbia Circuit, and the Ninth Circuit. The results were wholly at odds.

2. In *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *petitions for cert. filed*, Nos. 614, 615, the U.S. Army Corps of Engineers had issued a permit authorizing New York State's Department of Transportation to effect the dredging and filling of a portion of the Hudson River necessary for the construction of a six-lane highway. Suit was brought by the Sierra Club, the Citizens Committee for the Hudson Valley (an unincorporated association of citizens who resided near the proposed highway), and the Village of Tarrytown (through which the highway would pass) to enjoin the issuance of any permits or the commencement of any construction in the absence of Congressional consent and approval of the Secretary of Transportation as required by the Rivers and Harbors Act and the Department of Transportation Act. The District Court granted the relief sought, and the defendants on appeal raised the issue of standing.

Dealing first with the Sierra Club and the Citizens Committee, the Court of Appeals noted that they

> "made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were 'aggrieved' when the Corps acted adversely to the public interest. They are, as the federal defendants observe, serving as 'private Attorney Generals' to protect the public interest." [425 F.2d at 102.]

The court was thus faced with the "personal stake or interest" question left unanswered by this Court. Its solution was to require that an organization asserting the public interest demonstrate, by reference to its established purposes

and record of activities, a serious and responsible concern about the particular issue involved.

> "All plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit. They have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proved the genuineness of their concern by demonstrating that they are 'willing to shoulder the burdensome and costly processes of intervention' in an administrative proceeding. * * * They have 'by their activities and conduct * * * exhibited a special interest in' the preservation of the natural resources of the Hudson Valley." [425 F.2d at 103.]

The court was therefore led to conclude that each of the plaintiffs had standing, "as responsible representatives of the public, * * * to obtain judicial review of agency action alleged to be in contravention of [the] * * * public interest" [425 F.2d at 105].

3. The District of Columbia Circuit reached the identical result in *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). In *Hardin*, five organizations engaged in activites relating to the environment" [428 F.2d at 1095], including EDF and the Sierra Club, sought to compel the Secretary of Agriculture to issue notices of cancellation for all economic poison containing DDT and to suspend registration for such products pending cancellation proceedings. On the Secretary's motion to dismiss, the Court of Appeals held that the petitioners had standing, that the Secretary's refusal to act was a final order, and that the order was reviewable.

With respect to standing the court noted that the injury complained of was of universal nature.

> "The injury alleged by petitioners is the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment." [428 F.2d at 1096.]

Therefore, since the petitioners asserted no special harm to themselves or their members, the question was whether an organization such as EDF or the Sierra Club could have standing as a representative of the public's interest in preventing environmental degradation, and if so whether these particular organizations had a sufficient stake in the outcome for purposes of Article III. As to both questions the court agreed with the Second Circuit.

> "[T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." [428 F.2d at 1097; footnote omitted.]

4. By contrast, the Ninth Circuit on almost identical allegations could find no personal stake or interest in the Sierra Club and expressly rejected the notion that an organization asserting the public interest could, without some allegation of direct injury to itself, have standing to sue in the federal courts. The Sierra Club had alleged that it is a nonprofit California corporation with a national membership of 78,000. It asserted that "it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada Mountains" [App.

9]. The Club alleged that its interests would be vitally affected by the action sought to be enjoined. This was not enough.

> "The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an 'interest' in the sense that the proposed course of action indicated by the Secretaries does not please its officials and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. * * *
>
> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." [App. 10.]
>
> "We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them." [App. 16.]

The court below evidently was unaware of the District of Columbia Circuit's decision in *Hardin*, but it did recognize that the Second Circuit had found standing in the Sierra Club as a representative of the public interest. The court observed in this connection that the Club had there been "joined by local conservationist organizations made up of local residents and users of the area" [App. 17].[5] It

[5] In fact, while the Citizens Committee consisted of local residents, there is nothing in the Second Circuit opinion nor in the opinion of the District Court (302 F.Supp. 1083) to suggest that plaintiffs were "users" of the area. We assume the court below had reference to a District Court opinion also cited in this connection, *Parker v. United States*, 307 F.Supp. 685 (D. Colo. 1969).

did not, however, suggest that this was important to the decision there, for the Second Circuit was quite clear both that the Sierra Club had independent standing and that the "local conservationist organization," like the Sierra Club, made no claim of economic or other direct harm but asserted instead the public interest in conserving natural resources [425 F.2d at 102].[6] The Ninth Circuit accordingly acknowledged that it flatly disagreed with the Second Circuit's holding with respect to the Sierra Club's standing to assert the public interest.

> "To the extent to which *Citizens Committee for Hudson Valley v. Volpe, supra,* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute 'conferring on any non-official person, or on a group of non-official persons, authority to bring a suit' to prevent unauthorized official action. See, *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 864. We find no indication in any federal statute that Congress has 'conferred' on the Sierra Club or any group like it, authority to bring suits to challenge official action." [App. 17, n. 9.]

5. The requirements for standing are thus quite different in the three circuits. In the Second Circuit and District of Columbia Circuit, an organization may litigate an environmental issue if it alleges that by its activities and conduct it has demonstrated a special interest in the preservation of natural resources in general and that issue in particular. In the Ninth Circuit, the same organization making the same allegations would be barred, for one must allege some "direct and obvious interest" [App. 17], such as property dam-

---

[6] It may be worth noting here that a "resident or user" rule, unless read very broadly, would in effect arbitrarily immunize from judicial scrutiny *any* administrative determination affecting (1) remote and inaccessible public lands or water, as in Alaska, and (2) natural resources that are not usable in any normal sense, such as protected game.

age or other economic injury, threat to the organization's status, or danger to its members. Uniform application of federal constitutional law requires that this Court review the Ninth Circuit's decision and resolve the important issue of standing.

B. The Decision Below Would Foreclose Judicial Review of Important Agency Determinations

We believe the conflict in the Circuits should be resolved by this Court and resolved favorably to the Petitioner, for the alternative is effectively to insulate from judicial review even the most blatantly lawless administrative determinations affecting the nation's public lands and natural resources. We do not consider it necessary or appropriate to dwell upon the obvious importance of sound management and wise use of this nation's precious resources. We accordingly discuss here only the crucial role of the courts in environmental protection and the impact of the decision below upon that role.

1. It is the policy of the United States that the nation's public lands shall be managed "to provide the maximum benefit for the general public." Act of Sept. 19, 1964, § 1, 78 Stat. 982, 43 U.S.C. § 1391 (1964). In practice, however, there is little assurance that this policy is effectuated. First, our public land laws are, as the Congress has recognized, "inadequate to meet the current and future needs of the American people" and in any event "are not fully correlated with each other." *Id.*, § 2, 43 U.S.C. § 1392 (1964). The Public Land Law Review Commission, established by the Congress in 1964 to conduct a comprehensive review of these laws and their administration, found after five years of study that the Congress has "largely delegated to the executive branch" its authority over public lands, and that these "delegations have often been lacking in standards or meaningful policy determinations." Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress*, p. 2 (June 1970).

The administration of these inadequate laws has in turn been inadequate. Thus, the Commission found "serious procedural problems" in the implementation of Congressional policy by the federal land management agencies [*id.* at 251], including exclusion of the public from participation in land use planning activities [*id.* at 57, 251]. Rules and regulations governing the use of federal lands, "to the extent they exist, have not been adequate to fulfill the purpose," have been promulgated without consulting those affected or the general public, establish cumbersome and expensive procedures, and give "no assurance of objective, impartial consideration" [*id.* at 2]. The Commission accordingly recommended an overhaul of agency procedures to "embody proper regard for traditional due process concepts of fairness and equity" [*id.* at 251]. It also recognized, however, the overriding need for judicial review of land determinations, declaring that it was "convinced that without the availability of some kind of court review, any legislative or administrative improvements * * * would be largely only advisory" [*id.* at 256].[7]

It requires no extensive discussion to show that the national environmental organizations such as EDF and the Sierra Club are the most effective litigators in this crucial area. Without their professional resources many critical environmental problems would never be recognized or, if recognized, never result in legal action. This was the thrust of a recent letter from the Chairman of the President's Council on Environmental Quality to the Commissioner of Internal Revenue, in which he recommended continuation of tax exempt status to organizations that litigate to

---

[7]The Commission recommended as a means of minimizing "the dilatory effects of court involvement * * * that in general the availability of judicial review be limited to those parties who participated in the administrative proceeding for which review is sought" [Report, p. 257]. In this connection we note that the Sierra Club requested a hearing before the Forest Service and the Secretaries of Agriculture and Interior but to no avail [R. 66-67].

protect the environment because "private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique" [*BNA Environment Rep.*, Current Dev., p. 26:629 (Oct. 16, 1970)]. The letter explained that litigating groups have strengthened anti-pollution enforcement, have encouraged elimination of regulatory gaps, and have represented the public's interest in enforcement of new governmental procedures [*id.*, p. 28:701 (Nov. 6, 1970)]. Numerous congressmen have endorsed these views [*id.*, p. 26:652 (Oct. 23, 1970]. The Ninth Circuit's decision, by barring to these organizations access to the courts in that jurisdiction, will thus effectively shield from public scrutiny, and from the public consciousness as well, many administrative decisions bearing importantly on the environment. The nation cannot, we submit, tolerate so retrogressive a step.

2. The decision's primary impact will, of course, be upon the public lands located in the Ninth Circuit. This is but little comfort. One-third of the nation's land—755 million acres—is federally owned, and 78% of the public lands are in the states of the Ninth Circuit [Public Land Law Review Commission Report, *supra*, at 327]. Indeed, nearly half of all federal land is in the state of Alaska [*id.*], much of it remote and inaccessible. By the Ninth Circuit's decision these lands are abandoned to administrative caprice, for none can allege that an unlawful determination respecting remote public lands damages its property or threatens its status or endangers its members. Since only the "public" suffers the injury in fact, and since the Ninth Circuit excludes representatives of the public, there can as a practical matter be no effective remedy for unlawful agency action.[8]

[8] Although by careful forum-shopping groups like EDF and the Sierra Club could sue federal officials in the District of Columbia where standing would present only minimal difficulties, the witnesses, the land, and the most intimately concerned public would all be on the West Coast. This would surely handicap any effort to conduct effective litigation.

Such a sacrifice of our precious public lands should not, we submit, be made without this Court's review.

CONCLUSION

The decision of the court below conflicts with recent decisions in two other circuits. It is essential that the conflict be resolved promptly lest by unlawful agency action the nation's natural resources be mismanaged and despoiled. The issue is one of great legal and practical importance and should be decided by this Court.

Respectfully submitted,

MARK L. EVANS
ANTHONY A. LAPHAM
RICHARD M. SHARP
DONALD S. BURRIS
734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS
162 Old Town Road
East Setauket, New York, 11733

Attorneys for Amicus Curiae
Environmental Defense Fund

SHEA & GARDNER
Of Counsel

November 23, 1970